Aluminium Company of Malaysia Bhd v Ng Than Chai & Anor

HIGH COURT (MELAKA) — ORIGINATING MOTION NO 25-01-93
MOHD NOOR J
19 AUGUST 1994

Land Law *— Restraints on dealings — Caveats — Guarantee secured by charge over land — Application for removal of caveat by chargee — Whether chargor had power to execute valid guarantee and charge — Whether chargor acted ultra vires its powers — Local Government Act 1976 ss 13, 46 & 101 — National Land Code 1965 s 241(3)(a)*

Local Government *— Local authority — Powers of district council — Whether execution of guarantee ultra vires its powers— Local Government Act 1976 ss 13, 46 & 101*

Words and Phrases *— 'Borrow' — Whether includes execution of guarantee — Local Government Act 1976 s 46*

The respondents were purchasers of a shophouse to be built on land owned by the Majlis Daerah Jasin ('the Majlis') and had entered a caveat over the land to protect their interests. A month before the purchase, the Majlis gave a guarantee secured by a charge over the land to the applicant for goods supplied by the applicant on credit to a third party. The charge and guarantee were executed without the approval of the state authority as required under the Local Government Act 1976 ('the Act'). The third party failed to pay for the goods and the applicant obtained an order for sale. The applicant has applied for, inter alia, an order to remove the respondents' private caveat. The issue before the court was whether the guarantee and charge were void for being ultra vires.

Held, dismissing the application for removal of the caveat:

(1) A natural person has the capacity to do all things save such as are forbidden or prohibited by law. But in the case of a corporate body established by statute, as the Majlis is by virtue of s 13 of the Act, this rule is reversed. What is not expressly or impliedly authorized or permitted by statute is taken to be prohibited by the doctrine of ultra vires.

(2) The Act does not expressly or impliedly empower the Majlis to give a guarantee. 'Borrow' in the Act does not include 'guarantee'. Since the Majlis had no power to give a guarantee in consequence of which the charge was created, it could not exercise the power of charging under the National Land Code 1965. Furthermore, the giving of the guarantee and the creation of the charge were clearly not reasonable and not incidental to the carrying into

effect of the Majlis' statutory purpose. Therefore, the charge and guarantee were null and void, as being ultra vires.

Obiter:

By s 46(1) of the Act, the Majlis is empowered to borrow with the approval of the state authority, and, under sub-s (2), the loan may be secured by mortgage or charge or debenture. Therefore, even if the transaction could be regarded as a loan, it would still be void as the approval of the state authority had not been obtained.

[Bahasa Malaysia summary

Responden merupakan pembeli sebuah rumah kedai yang akan dibina di atas tanah yang dipunyai oleh Majlis Daerah Jasin ('Majlis itu') dan telah memasukkan suatu kaveat ke atas tanah itu untuk melindungi hak mereka. Sebulan sebelum pembelian tersebut, Majlis itu telah memberi suatu gerenti yang dijamin oleh suatu gadaian atas tanah itu kepada pemohon berkenaan dengan barangan yang dibekalkan oleh pemohon secara kredit kepada suatu pihak ketiga. Gadaian dan gerenti itu telah disempurnakan tanpa kelulusan pihak berkuasa negeri seperti yang diperlukan di bawah Akta Kerajaan Tempatan 1976 ('Akta itu'). Pihak ketiga itu gagal membuat bayaran bagi barangan itu dan pemohon telah mendapatkan suatu perintah jualan. Pemohon telah memohon untuk, antara lain, suatu perintah bagi membatalkan kaveat persendirian responden. Isu di hadapan mahkamah adalah sama ada gerenti dan gadaian itu terbatal kerana ultra vires.

Diputuskan, menolak permohonan untuk pembatalan kaveat itu:

(1) Setiap orang mempunyai keupayaan untuk membuat semua perkara kecuali perkara yang dihalang atau dilarang di sisi undang-undang. Tetapi di dalam kes sesebuah badan korporat yang ditubuhkan oleh statut, seperti Majlis itu di bawah s 13 Akta itu, rukun ini menjadi terbalik. Apa yang tidak dikuasakan oleh statut secara nyata atau tersirat dianggap sebagai dilarang mengikut doktrin ultra vires.

(2) Akta itu tidak memberikan kuasa kepada Majlis itu secara nyata atau tersirat untuk memberikan suatu gerenti. 'Pinjam' di dalam Akta itu tidak termasuk 'gerenti'. Oleh kerana Majlis itu tidak mempunyai kuasa untuk memberikan suatu gerenti akibat mana gadaian itu diwujudkan, ia tidak boleh menggunakan kuasa gadaian di bawah Kanun Tanah Negara 1965. Lagipun, pemberian gerenti dan pewujudan gadaian itu jelas tidak munasabah dan tidak berkaitan dengan perlaksanaan tujuan statutori Majlis itu. Oleh yang demikian, gadaian dan gerenti itu adalah terbatal dan tidak sah kerana ultra vires.

Obiter:

Mengikut s 46(1) Akta itu, Majlis itu mempunyai kuasa untuk meminjam dengan kelulusan pihak berkuasa negeri dan, di bawah sub-s (2), pinjaman itu boleh dijamin oleh suatu gadai-janji atau gadaian atau debentur. Oleh itu, sekalipun transaksi itu boleh dianggap sebagai suatu pinjaman, ia masih terbatal kerana kelulusan pihak berkuasa negeri tidak diperolehi.]

Notes

For cases on removal of caveats, see 8 *Mallal's Digest* (4th Ed) paras 1688–1715; [1989] Mallal's Digest 1086–1090; [1990] Mallal's Digest 838–844; [1991] Mallal's Digest 1319–1328; [1992] Mallal's Digest 1190–1201; [1993] Mallal's Digest 970–974, 976–980.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission & Anor [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163 (folld)

Ashbury Railway Carriage and Iron Co Ltd v Riche (1875) LR 7 HL 653 (refd)

A-G v Great Eastern Railway Co (1880) 5 App Cas 473 (refd)

PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)

Penang Development Corp v Teoh Eng Huat & Anor [1992] 1 MLJ 749; [1993] 2 MLJ 97 (SC) (folld)

Public Textiles Bhd v Lembaga Letrik Negara [1976] 2 MLJ 58 (refd)

Tan See v Wing Tiek Holdings Bhd (formerly known as Wing Tiek Hardware Sdn Bhd) [1992] 1 CLJ 78 (not folld)

Legislation referred to

Federal Constitution art III

Local Government Act 1976 ss 13, 41, 42, 46, 49, 101(gg), (hh)

National Land Code 1965 ss 241, 340(2)(b)

TL Gan (*Yong & Rakan-Rakan*) for the applicant.

J Amardas (*SF Pang & Chandra*) for the respondent.

Cur Adv Vult

Mohd Noor J: The applicant seeks, inter alia, an order to remove a private caveat lodged by the respondents in respect of land held under HS(M) 607, Lot No 28, PT 1003 Mukim Jasin, Melaka (hereinafter referred to as 'the said land').

The brief facts leading to this application are these. On 25 June 1984, Usahasama Holdings Sdn Bhd (hereinafter referred to as 'the developer') entered into a joint venture agreement with Majlis Daerah

A Jasin (hereinafter referred to as 'the Majlis') to develop the Jasin Town Commercial Centre (hereinafter referred to as 'the project') on a big piece of land belonging to the Majlis on which the said land is situated. On 8 June 1987, the respondents bought a shophouse to be built by the developer on the said land at RM125,000. Payment has not been made in full and the construction of the shophouse has not been completed. About B a month earlier, ie on 5 May 1987, the Majlis charged the said land to the applicant as security in respect of a guarantee given by the Majlis to the applicant for goods supplied by the applicant on credit to Perusahaan Tinggi (M) Sdn Bhd. The guarantee given and the charge created by the Majlis was done without the approval of the state authority. Perusahaan C Tinggi (M) Sdn Bhd failed to honour its obligation to pay for the goods supplied and the applicant took steps to realize the security. On 27 June 1987, the respondents lodged a private caveat on the said land. On 24 September 1987, on an ex parte application by the respondents, the caveat was extended. On 12 November 1987, the applicant obtained an D order of sale and the auction was done on 12 June 1992 which was not successful.

On the facts, it is evident that:

(1) the Majlis gave a guarantee to the applicant and charged the said land for the purpose;

E (2) the guarantee given and the charge created was done without the approval of the state authority; and

(3) the title to the said land does not contain any restriction on creation of the charge.

F The central issue in this case, which is serious, is whether the guarantee and the charge are null and void on the ground of the doctrine of ultra vires? The learned counsel for the applicant contends, if I understand her correctly, that the guarantee and the charge are valid because:

(i) the Local Government Act 1976 (hereinafter referred to as 'the Act') does not prohibit the Majlis from giving the guarantee;

G

(ii) the giving of the guarantee and the creation of the charge by the Majlis are reasonable and incidental to the carrying into effect of its statutory purpose having regard to its powers under ss 13 and 101(gg) and (hh) of the Act;

H (iii) if by reason of cl 8 (personal liability of chargors) and cl 41 (chargors as principal debtors) of the charge annexure, the charge transaction is tainted with illegality since liability of a debtor is imposed on the Majlis, such illegality can be severed from the rest of the transaction; and alternatively,

(iv) the guarantee and the charge are two separate matters and if the I guarantee is invalid the charge is valid because under s 241 of the National Land Code 1965 (hereinafter referred to as 'the Code'), the Majlis, as a body corporate, has the power of charging its land.

On the other hand, the learned counsel for the respondents asserted that both transactions are null and void being ultra vires. It is settled law that a natural person has the capacity to do all things save such as are forbidden or prohibited by law. But this rule is reversed in the case of a corporate body established by statute (which the Majlis is by virtue of s 13 of the Act), and, in relation thereto, what the governing statutory provisions do not expressly or impliedly authorize or permit is to be taken to be prohibited not by virtue of any express or implied statutory prohibition but by the doctrine of ultra vires (see *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653; *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473 at p 481; *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 58 at p 63; *PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 205; *Penang Development Corp v Teoh Eng Huat & Anor* [1992] 1 MLJ 749 at pp 754, 755 and 756). Under the broad concept of ultra vires developed since the landmark case of *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163 as discussed by his Lordship Jemuri Serjan CJ (Borneo) in *Penang Development Corp v Teoh Eng Huat & Anor* [1993] 2 MLJ 97, in the words of his Lordship, the notion of ultra vires now encompasses a situation where the public authority commits an error of law albeit that the authority's action is undeniably of a kind falling within the field of activity allocated to it by the law. Professor Wade in *Wade on Administrative Law* (6th Ed) at p 44 commented:

> In general, however, the courts adhere firmly to the wide meaning of 'jurisdiction', since this is the sheet-anchor of their power to correct abuses. They appear to be willing to stretch the doctrine of ultra vires to cover virtually all situations where statutory power is exercised contrary to some legal principle ...

Thus, where official action, while being within the scope of the authority of the law or a corporation, becomes erroneous on some grounds, such action would now be described as ultra vires, being outside jurisdiction, under the broad concept of ultra vires.

Let us examine the relevant provisions of the Act. Section 13 provides that the Majlis shall be a body corporate and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform. Section 41(1) empowers the Majlis to raise loans for the purposes as stipulated in the section with the consent of the state authority, and s 42(1) and (2) enable the Majlis to mortgage or charge or create and issue debenture stock in respect of its assets as securities for loans so raised with the approval of the state authority. By s 46(1), with the approval of the state authority, the Majlis is empowered to borrow for the purpose of carrying out any development for residential, commercial and industrial undertakings, and under sub-s (2) the loan may be secured by mortgage or charge or debenture upon the assets and the revenues derived from the assets, in respect of which the money is borrowed. Finally, s 49 empowers the Majlis to obtain overdrafts from any bank and such overdrafts shall, unless

covered by fixed deposits with the same bank, require the approval of the state authority.

In my view, from the said provisions, it is manifestly clear that the intention of Parliament is to ensure that the Majlis is not unnecessarily saddled with debts beyond its means to pay, which may adversely affect its authority, integrity and efficiency, and also to safeguard its assets from improper disposal. That is the rationale behind the need to obtain the consent or approval of the state authority. In a nutshell, the Majlis is empowered by the Act only to borrow or obtain an overdraft.

Nowhere in the Act is the Majlis either expressly or impliedly empowered to give a guarantee. To my mind, on this ground alone, the charge created in consequence of the said guarantee is null and void, being ultra vires. Even if assuming that the approval of the state authority had been obtained to create the charge, the position is still the same because the Majlis has no power to give the guarantee and by analogy from the provisions of art III of the Federal Constitution where 'borrow' and 'guarantee' are treated separately, 'borrow' in the Act does not include 'guarantee'. It may be argued that, by reason of cl 8 (personal liability of chargors) and cl 41 (chargors as principal debtors) of the charge annexure, the transaction can be or ought to be regarded as a loan transaction and hence, the transaction is authorized by the Act. In my opinion, the position is still the same because in substance the transaction is a guarantee, and if I am wrong in this respect, that is to say, the transaction ought to be regarded as a loan transaction, my view is that, since the approval of the state authority was not obtained to create the charge, the transaction is still null and void under the broad concept of ultra vires. The fact that the title to the said land does not contain any restriction on the creation of the charge does not alter the position. No doubt by virtue of s 13 of the Act, the Majlis as a body corporate, has the power of charging its land under s 241 of the Code. However, that power must be exercised in accordance with what is authorized by the Act, viz the power to borrow and to mortgage or charge its land under ss 41, 42 and 46. This interpretation is in consonance with the expression '... generally do and perform such acts and things as bodies corporate may by law do and perform' appearing in s 13 of the Act. Since the Majlis has no power to give a guarantee in consequence of which the charge was created, it cannot exercise the power of charging under the Code. I am fortified in my view by the provision of s 241(3)(a) of the Code which reads:

> The said powers shall be exercisable in any particular case subject to —
>
> (a) any *prohibition* or limitation imposed by this Act or *any other written law* for the time being in force; ... (Emphasis added.)

To my mind, prohibition therein includes what is taken to be prohibited by the doctrine of ultra vires as stated in para 5 above. Any other written law includes the Act.

With regard to the contention of the learned counsel for the applicant that the giving of the guarantee and the creation of the charge are reasonable

and incidental to the carrying into effect of the Majlis' statutory purpose, let me set out the provisions of s 101(gg) and (hh) of the Act first:

> In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely —
>
> (gg) to carry out any development, either by itself or with any other local authority or person, for residential, commercial, industrial or any other undertaking which the local authority may determine; and
>
> (hh) to incur all expenditure necessary for civic receptions authorized by the local authority or for the carrying out of any purpose of this Act or of any purpose not specially provided for in this Act which the local authority may determine to be a purpose calculated to facilitate or is conducive to or incidental to the exercise by the local authority of its powers and duties under this Act.

With regard to sub-s (gg), my view is that it merely empowers the Majlis to do what is stated therein but not to the extent of empowering it to give a guarantee and to create a charge of its land for the purpose. With due respect, it is absurd to suggest that under this further power the Majlis can give the guarantee and create the charge of its land without the need to obtain the consent or the approval of the state authority and whereas to borrow and to create the charge under ss 41, 42 and 46 of the Act it must obtain such consent or approval. This interpretation is repugnant to the wisdom of Parliament as stated in para 7 above. In respect of sub-s (hh), to my mind, it merely empowers the Majlis to incur expenses for the purposes stipulated therein short of empowering it to give the guarantee and to create the charge without the consent or approval of the state authority, otherwise it would lead to the same absurdity. Therefore, the giving of the guarantee and the creation of the charge are clearly not reasonable and not incidental to the carrying into effect of the Majlis' statutory purpose.

As the issue is purely of law and has been extensively argued before me with the necessary documents produced, unlike in the case of *Tan See v Wing Tiek Holdings Bhd (formerly known as Wing Tiek Hardware Sdn Bhd)* [1992] 1 CLJ 78, I am now in a position to decide the issue. Hence, I conclude that the guarantee and the charge are null and void. And by virtue of s 340(2)(b) of the Code, the applicant's interest in the land shall not be indefeasible because the registration was obtained by means of a void instrument.

Therefore, the application is dismissed with costs.

Application dismissed.

Reported by Anne Khoo